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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

EPILEPSY ASSOCIATION OF UTAH, a Utah non-profit corporation; CHRISTINE STENQUIST; DOUGLAS ARTHUR RICE; TRUCE, a Utah non-profit corporation; NATHAN KIZERIAN; SHALYCE KIZERIAN; ANDREW TALBOTT, M.D., Plaintiffs, v. GARY R. HERBERT, Governor of the State of Utah, in his official capacity; JOSEPH K. MINER, M.D., MSPH, Executive Director, Utah Department of Health, in his official capacity, Defendants.	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' SUGGESTION OF MOOTNESS** Case No.: 2:19-cv-00360-DBP Magistrate Judge Dustin B. Pead

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INTRODUCTION

Defendants (1) invoked this Court's jurisdiction to address the merits of Plaintiffs' claims by removing the matter to federal court[1] and (2) thereafter filed a Rule 12(b)(1) motion to dismiss Plaintiffs' claims, with prejudice, arguing that because Plaintiffs lack standing in federal court, this Court lacks subject matter jurisdiction to address the merits of Plaintiffs' claims.[2] When Plaintiffs sought a remand to state court, pointing out the glaring contradiction in Defendants' maneuvers, Defendants resisted remand as if they had not previously argued, for twenty-five pages, that "PLAINTIFFS LACK STANDING, SO THE COURT LACKS JURISDICTION."[3] Continuing to abdicate their burden as the removing party of establishing this Court's jurisdiction, Defendants now seek *dismissal* of the Second Claim for Relief ("Federal Claim") and remand of the First Claim for Relief by asking the Court—which Defendants have asserted has no jurisdiction—to dismiss Plaintiffs' Federal Claim and declare it to be moot because the challenged statute was amended.

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[1] Defendants' Notice of Removal of a Civil Action from State Court to Federal Court [ECF 2].

[2] Defendants' Motion to Dismiss Amended Complaint [ECF 14], at 11–35.

[3] *Id.*, at ii (capitalization in original); Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand Case to State Court and for the Award of Attorney Fees [ECF 21].

The amended statute is still in direct violation of federal law by commanding state employees to commit federal felonies. Therefore, the amended statute is still preempted and Plaintiffs' Federal Claim is not moot. At most, the legislative amendment will lead Plaintiffs to seek leave to amend their complaint. Further, the removal of this case was improper from the outset and, therefore, this Court cannot properly exercise jurisdiction over *any* aspect of the case. Accordingly, this Court cannot dismiss any claims and must remand the matter to state court, which Plaintiffs urge the Court to do without any more delay.

ARGUMENT

I. The Recently Amended Utah Medical Cannabis Act Is Still Preempted by Federal Law; Therefore, Plaintiffs' Federal Claim Is Not Moot.

2018 Utah H.B. 3001 ("H.B. 3001") amended the initiative law enacted by the majority of voters through the 2018 Utah Proposition 2 ballot initiative ("Proposition 2"). Among numerous other changes to the initiative law, H.B. 3001 amended the law to create a "state central fill medical cannabis pharmacy." Under those provisions, state and county employees were required to commit federal felonies by participating in a system of purchasing, storing, selling, and distributing medical cannabis. Those provisions were in direct violation of the Federal Controlled Substance Act, 21 U.S.C. Ch. 13 ("CSA"), and were therefore preempted.

> The CSA prohibits the manufacture, distribution, and possession of marijuana. **Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime.** The federal government can prosecute such offenses for up to five years after they occur . . . . **Nor does any state law "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art. VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.**

United States v. McIntosh, 833 F.3d 1163, 1179, n.5 (9th Cir. 2016) (emphasis added).

> A handful of states have proposed supplying marijuana directly to qualified patients via state-operated farms and distribution centers . . . . The CSA, however, clearly preempts any such state program.

Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1432 (2009).

Any state law compelling a person to violate the CSA is invalid and preempted. *See, e.g., People v. Crouse*, 2017 CO 5, 388 P.3d 39 (state constitutional provision requiring police to return marijuana to those acquitted on drug charges is invalid and preempted by the CSA because state law would require "distribution" of marijuana in conflict with federal law); *Bourgoin v. Twin Rivers Paper Co.*, 2018 ME 77, 187 A.3d 10 (employer could not be *required* by the state medical marijuana

act to reimburse an employee for medical marijuana because the state statute's requirement was in direct conflict with the CSA).

Apparently having finally recognized, at least in part, the obvious constitutional infirmity of the "state central fill" provisions—a point that previously was made clear to the Legislature and other government officials[4]—the Legislature passed 2019 S.B. 1002, which amended the Utah Medical Cannabis Act to "repeal and reenact"[5] Part 6 of the Utah Medical Cannabis Act. In place of the "state central fill pharmacy," the Legislature created a "state central patient portal." Rather than save the Utah Medical Cannabis Act from its unconstitutionality, however, S.B. 1002 has simply substituted a different, equally preempted and constitutionally invalid command by Utah statute to commit federal felonies.

The newly amended Utah Code § 26-61a-601 now states, in part, as follows (emphasis added):

> (1) . . . the department ***shall*** establish or contract to establish . . . a state central patient portal as described in this section.

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[4] *See* Ben Winslow, *Lawyer says Utah's new medical cannabis law is a 'full service drug cartel'*, Feb. 21, 2019, FOX 13 NEWS SALT LAKE CITY, available at https://fox13now.com/2019/02/20/lawyer-says-utahs-new-medical-cannabis-law-is-a-full-service-drug-cartel/; *Letter: Bill to replace Prop 2 is illegal*, Feb. 21, 2019, ABC4 NEWS, available at https://www.abc4.com/news/local-news/letter-bill-to-replace-prop-2-is-illegal/.

[5] *See* 2019 S.B. 1002 [ECF 27-1], at 8:175–79 ("REPEALS AND REENACTS: 26-61A-601 . . . 602 . . . 603 . . . 604").

> (2) The state central patient portal ***shall***: . . . . (d) . . . ***facilitate*** an electronic medical cannabis order to a home delivery medical cannabis pharmacy; . . . .

That provision is directly pre-empted by the CSA, which provides as follows:

> It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or ***facilitating*** the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

21 U.S.C. § 843(b) (emphasis added).

The newly amended Utah Medical Cannabis Act repeatedly makes clear that S.B. 3001 requires the "facilitation" of federal felonies by describing a system involving "electronic medical cannabis orders that the state central patient portal *facilitates*." Utah Code § 26-61a-605(2)(a) (emphasis added). *See also* Utah Code § 26-61a-102(15) (describing "electronic orders" for medical cannabis "that the state central patient portal facilitates"); § 26-61a-102(23)(b) (same); § 26-61a-102(30) (same); § 26-61a-102(39) (same); § 26-61a-305(4)(a)(ii) (same); § 26-61a-604(1) (same); § 26-61a-605(2)(a) (same); § 26-61a-703(1(j) (same).

Under the CSA, it is, with only a few, inapplicable exceptions, a felony to "manufacture, ***distribute***, or ***dispense***" cannabis. 21 U.S.C. § 841(a)(1) (emphasis

added). Accordingly, the newly amended Utah Medical Cannabis Act requires the State and its employees to "facilitate" felonies under the CSA, thus committing felonies themselves.

The new provisions of the Utah Medical Cannabis Act are also preempted because, in direct violation of the CSA, the "state central patient portal" functions to (1) "propose" and "facilitate" actual transactions "in a Schedule I controlled substance," (2) use the Internet to "advertise" and "offer" a Schedule I controlled substance, (3) use the Internet to "refer" and "direct" "prospective buyers to Internet sellers of controlled substances who are not registered . . . .", and (4) facilitate a conspiracy to commit the sale and distribution of medical cannabis. *See* 21 U.S.C. § 843(c); § 846.

II. This Court May Not Dismiss Plaintiffs' Federal Claim; Pursuant to § 1447(c), the Case Must Be Remanded to State Court.

Defendants invoked this Court's jurisdiction by removing the matter from state court,[6] then contradictorily moved under Rule 12(b)(1), Fed. R. Civ. P., to dismiss Plaintiffs' claims for lack of subject matter jurisdiction.[7] Plaintiffs have

[6] Defendants' Notice of Removal of a Civil Action from State Court to Federal Court [ECF 2].

[7] Defendants' Motion to Dismiss Amended Complaint [ECF 14].

demonstrated that Defendants' "dubious strategy"[8] could result in nothing other than a remand back to state court—and a waste of the time and resources of the parties and the courts.[9] Accordingly, Plaintiffs should be awarded their attorneys' fees.[10]

Seeking to avoid a determination of Plaintiffs' motion to remand, Defendants seek *dismissal* of Plaintiffs' Federal Claim and dismissal of Plaintiffs' motion for remand on the purported grounds that the Federal Claim and Plaintiffs' motion for remand are moot.

"[T]he plain language of [28 U.S.C.] § 1447(c) gives no discretion to dismiss rather than remand an action removed from state court over which the court lacks subject-matter jurisdiction." *Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1226 (10th Cir. 2012) (quoting *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553,

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[8] Plaintiffs' Reply Memorandum in Support of Motion to Remand Case to State Court [ECF 22], at 10–11 (citing *Collier v. SP Plus Corp.*, 889 F.3d 894, 895–97 (7th Cir. 2018)).

[9] *Id.* at 9–10 ("In *every* case in which a defendant has removed a case to federal court, then filed a Rule 12(b)(1) motion for lack of subject matter jurisdiction, the case has been remanded to state court." (citations omitted)).

[10] The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff.

Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005).

557–58 (10th Cir. 2000)). "[T]he literal words of § 1447(c), . . . on their face, give . . . no discretion to dismiss rather than remand an action." *Inter'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (quoting another source) (second ellipses in original). Whether a district court could properly *dismiss*, rather than *remand*, a claim that was not ripe was addressed by the Seventh Circuit Court of Appeals:

> [W]e believe that *the district court erred in dismissing the claim.* Standing and ripeness are jurisdictional prerequisites. Because [Plaintiff's] claim is not yet ripe, the district court lacked subject-matter jurisdiction and *was required under § 1447(c) to remand the claim* to the state court from which it was removed.

Smith v. Wisconsin Dep't of Agric., Trade, and Cons. Prot., 23 F.3d 1134, 1142 (7th Cir. 1994) (citations omitted). *See also Jepsen v. Texaco*, No. 94-6429, 1995 WL 607630, *3 (10th Cir. October 16, 1995) (unpublished) (vacating dismissal that was based on futility, remanding with instructions to remand to state court).

III. Plaintiffs' Motion for Remand Is Not Moot and Should Be Decided First.

The Court should decide Plaintiffs' Motion to Remand [ECF 15] prior to deciding Defendants' subsequently filed motion [ECF 27], which cites to no rule of

civil procedure but is apparently, once again, a motion to dismiss for lack of subject matter jurisdiction masquerading as a "Suggestion of Mootness."[11]

If the Court grants Plaintiffs' Motion to Remand [ECF 15], which seeks an award of attorneys' fees, there will be nothing left for the federal courts to decide, even on appeal, other than the amount of attorneys' fees to be awarded. *See* 28 U.S.C. § 1447(d). Plaintiffs will finally be able to pursue, in state court, a determination on the merits of their claims, without further delay and wasted resources of the Court and the parties.

It is unnecessary for this Court to venture into the merits of Plaintiffs' claims to determine whether any claim is moot. As demonstrated by Plaintiffs,[12] this case *must* be remanded because it was improperly removed. *Mocek v. Allsaints USA Ltd.*, 220 F. Supp. 3d 910, 914 (N.D. Ill. 2016) (". . . defendant tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction, apparently in hopes

[11] Defendants' motion asks the Court to "dismiss Plaintiffs' second claim for relief as moot," [ECF 27] at 7, essentially an untimely motion to dismiss Plaintiffs' claim for lack of subject matter jurisdiction. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010) (stating mootness is a question of subject matter jurisdiction). While the Utah Rules of Appellate Procedure provide for a "suggestion of mootness," *see* Utah R. App. P. 37, no counterpart exists in the Federal Rules of Civil Procedure or in this Court's Rules of Practice.

[12] Plaintiffs' Motion to Remand [ECF 15]; Plaintiffs' Reply Memorandum in Support of Motion to Remand [ECF 22].

of achieving outright dismissal, with prejudice, rather than the remand required by § 1447(c). . . . [N]o court has afforded that relief under similar circumstances, and defendant's own authority confirms that remand is 'mandatory.' ").

Further, in line with the guidance provided by Rule 1, Fed. R. Civ. P., "the just, speedy, and inexpensive determination" of this action will only be achieved if the Court first addresses Plaintiff's Motion to Remand [ECF 15]. Defendants improperly removed Plaintiffs' action on May 23, 2019, over four months ago. Plaintiffs seek a prompt determination of their claims for equitable relief. Those claims address patients' access to lifesaving and life-improving medicine, but as a result of Defendants' gamesmanship and erroneous legal analysis, Plaintiffs' claims have been severely stalled, with no progress toward a decision on the merits.

CONCLUSION

The unjustifiable confusion, delay, and waste caused by Defendants' reckless attempts to game the jurisdiction of this Court should be immediately brought to an end, with an award of attorneys' fees to deter such wrongful contrivances in the future and to compensate Plaintiffs. A determination by this Court of whether Plaintiffs' Federal Claim is moot, which it is not, is improper and unnecessary because this Court *must* remand the case since it was improperly removed by Defendants.

DATED this 7th day of October 2019:

LAW OFFICES OF ROCKY ANDERSON

/s/ Walter M. Mason
Walter M. Mason
Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

In compliance with the word-count limit of DUCivR 7-1(b)(2)(C), I certify that the foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' SUGGESTION OF MOOTNESS contains 2,357 words, excluding the face sheet and table of contents.

DATED this 7th day of October 2019:

LAW OFFICES OF ROCKY ANDERSON

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EPILEPSY ASSOCIATION OF UTAH, a Utah non-profit corporation; CHRISTINE STENQUIST; DOUGLAS ARTHUR RICE; TRUCE, a Utah non-profit corporation; NATHAN KIZERIAN; SHALYCE KIZERIAN; ANDREW TALBOTT, M.D.,

Plaintiffs,

v.

GARY R. HERBERT, Governor of the State of Utah, in his official capacity; JOSEPH K. MINER, M.D., MSPH, Executive Director, Utah Department of Health, in his official capacity,

Defendants.

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO REMAND CASE TO STATE COURT AND FOR THE AWARD OF ATTORNEY FEES AND DENYING DEFENDANTS' SUGGESTION OF MOOTNESS

Case No.: 2:19-cv-00360-DBP

Magistrate Judge Dustin B. Pead

Having carefully considered the memoranda filed by the parties, and good cause appearing therefor, THE COURT HEREBY ORDERS that Plaintiffs' Motion to Remand Case to State Court and for the Award of Attorney Fees is GRANTED and Defendants' Suggestion of Mootness is DENIED. This case is hereby remanded to the Third Judicial District Court of the State of Utah.

Pursuant to 28 U.S.C. § 1447(c), Defendants shall pay to Plaintiffs the amount of just costs and actual expenses, including attorney fees, incurred as a result of the removal.

The Clerk is directed to close this case. The determination by the Court of the amount of costs and expenses to be awarded will occur after the case is closed and after submissions by the parties relating to attorney fees.

Dated this ___ day of October 2019.

BY THE COURT:

_____
Dustin B. Pead
United States Magistrate Judge